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ABSTRACT

The promise of law reform in this area is real: it imposes formal rationality on school sorting practices, provides heretofore excluded handicapped youngsters with some educational services, and provokes both publicity and the appearance of change. The peculiar nature of the problem and certain structural and organizational attributes of present day special education programs make it difficult to translate legal reform into educational reality. Thus far, the courts that have spoken to the rights of special children have done so in quite broad terms. This is less the case with respect to due process, where judges can rely on well-established precedents in other institutional contexts, than with respect to substantive remedies. Courts can insist on adherence to constitutional standards in defining the minimum obligation of school districts. But school district practice will have profound influence on what role courts ultimately play. If bridges between the special and regular school worlds can be constructed and if children can be assured of discrete (and discreet) help without having to bear the label "special," then many of the concerns will simply vanish. (Author/IRT)

Trends in Education

The "Special" Child Goes to Court

by

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1976

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INTRODUCTION

The treatment of handicapped or "special" children is no longer the exclusive province of educators. Questions such as whether a particular child can benefit from some educational program or whether a student should be assigned to a regular or special class are no longer just pedagogical queries. They also pose problems of constitutional dimension. Courts have begun to assume an increasingly important role in deciding just how special children should be identified and educated.

This "judicialization" of special education is a recent development: the landmark decisions in the area are less than a decade old. The legal doctrines upon which courts have relied in shaping the rights of special children have deeper roots. They stem in part from the Supreme Court's holding, in Brown v. Board of Education,[1] that all children are constitutionally entitled to an equal educational opportunity. Yet they extend Brown's concern for the plight of black students to another discrete group—the handicapped—which has been badly treated by the schools. These doctrines are also based upon judicial decisions that assure handicapped adults, such as the institutionalized mentally ill and mentally retarded, a constitutional right to treatment, and in doing so guarantee them something more than incarceration.

To some special educators, legal intervention is a godsend, for it prods the schools into adopting what are regarded as long overdue reforms. Psychologist Burton Blatt, for example, has stated: "More and more I comprehend the powerful positive influence that lawyers, if not laws themselves, now exert within my field of work . . . [Lawyers are] heroes, even now, to some of us today."[2] To more conservative educators the new judicial role is viewed as an intrusion, a unsurpation of decision-making responsibility, an invasion of the legitimate prerogatives of the professionals. But whether one treats the law as a blessing or curse, judicial inquiry into certain special education determinations is a fact of life with which school professionals should reckon, at least for the foreseeable future.

This reality underscores the need for educators, and not only special educators, to understand just what has happened in the past few years, and what that history portends for further litigation. The leading court cases do not raise issues unfamiliar to schoolmen. Instead, they respond to long-standing criticisms of special education practice, and do so in a way that cannot be ignored. The same is likely to be true in the future: for when "special" children (or their families, or parent advocate groups) go to court, they are generally asking for no

*This paper was commissioned by UCEA in Summer 1974. Modest revisions were made which note recent judicial opinions through mid-1976.

more than what progressive educators tell them is their due. In short, the ways in which schools respond to the challenge of the courts will in no small part determine the extent and nature of judicial involvement in the future.

EDUCATIONAL CRITICISM AND JUDICIAL DECISIONS

Thus far, there are relatively few reported decisions concerning the rights of special children, and many of the critical issues have only recently been posed. But the record is sufficient to warrant both description and some cautious predictions. The general message is clear enough: educators, get your own houses in order, or the courts will do so for you. The current status of educational criticism and relevant judicial decisions as they affect the severely and mildly handicapped may be summarized as follows:

The Severely Handicapped

Most state laws treat the severely handicapped (those whose IQs fall below 30) as ineducable. Such younsters are excused—more accurately, excluded—from all publicly-supported instruction. Many of these children (estimated to number between 250,000 and and 1,000,000) spend their entire lives in state-run institutions that, while providing minimal care, lack the resources to undertake any training in self-help. State-licensed private schools do educate youngsters who have specific handicaps, but because these schools are self-supporting they generally enroll only children from well-to-do families. While a few states (Michigan, New York, and California among them) have sought to alleviate this fiscal inequity by providing educational vouchers for these youngsters, the vouchers rarely meet private school costs; thus, the burden of caring for the severely handicapped falls most heavily on the families who are unable to devote the time and resources needed to ensure adequate educational help.

Even when public school systems provide some instruction for the severely handicapped, what they offer is rarely adequate. Autistic children, for instance, who require costly and highly-structured, professionally staffed special programs are instead often lumped together with youngsters who have different handicaps and need different types of instruction. This approach does not recognize the individual needs of students and therefore does not provide in their continued growth and development.

It is these practices that were first challenged, at the beginning of the decade, and the impact of judicial decisions in this area has been most dramatic. The leading case, Pennsylvania Association for Retarded Children (P.A.R.C.) v. Commonwealth of Pennsylvania[3] and Mills v. Board of Education (Washington, D. C.)[4] have become so widely known in the education community as to merit being termed "landmarks." Their influence has been felt in court rulings in other states as

well, including Louisiana, Massachusetts, and Colorado. P.A.R.C. and Mills say much the same thing: no child is ineducable. As professionals in the field have long known, and public school teachers are beginning to find out, with proper guidance, all youngsters can move from a state of relative dependence to one of relative independence. Both decisions reaffirmed the fact that handicapped individuals have a constitutional right to state support for their education, more precisely, to a program which is "appropriate" or "suitable" to their needs. The fact that offering such a program may cost more than the regular curriculum is not a constitutionally adequate reason for not fulfilling the state's responsibility.

The courts have yet to suggest just what "appropriate" education means. In a suit involving institutionalized adults, both retarded and mentally ill, one federal district court adopted a remedial plan that detailed staffing patterns, housing arrangements, and the like. No similar outcome has been reached with respect to education. Two lawsuits demanding that schools provide a particular special program, not merely access to some publicly-financed instruction, were set aside by the courts, when the state legislatures decided to offer the sought-after program on a state-wide basis.[5] But disputes concerning the meaning of "appropriate" education may be anticipated in the near future. Advocates for exceptional children will insist generally that more and better special instruction be made available to those who literally cannot survive in the society without it.

The Mildly Handicapped

Typically, school districts offer special programs for the mildly handicapped, or at least to certain of these youngsters, such as the mentally retarded. But current and past practices have been criticized on a number of grounds. First, school systems appear to have difficulty distinguishing the normal from the special, and consequently misclassify a considerable number of students. In Washington, D. C., for example, the district itself retested its educable mentally retarded youngsters, and found that two-third of them belonged in regular programs.[6] A similar inquiry, undertaken by independent psychologists working in the Philadelphia metropolitan area, found that one quarter of all children who had been labelled educable mentally retarded were improperly placed, and that an additional forty percent probably had been misassigned.[7] Second, programs for the mildly handicapped invariably enroll a disproportionate number of non-white students, relative to their proportion of the population. In California, for example, the percentage of black children in classes for the educable retarded is more than twice their proportion of school-age youngsters; the same appears to hold true in track assignments, with non-white youngsters preponderant in the slower groups.

Neither of these phenomena, misclassification and minority overrepresentation, would be perceived as a serious problem were it not for the questionable educational value of most special programs for the mildly handicapped. Studies comparing the performance of matched groups of students in regular and special programs find that, despite the additional resources in special programs, their effect on educational achievement is minimal at best. In addition, students assigned to those

special programs are often looked down on by their peers and teachers. Only infrequently, when children with distinct learning disorders are identified early in their school careers and matched with particularly skilled teachers, do these special classes do much good. More often, they are an educational dead-end, and serve only to confirm the school's conclusion that a child is less capable than his peers.[8]

The converse is also true: some mildly handicapped youngsters who would indeed benefit from special instruction are denied it. This is particularly the case with those whose "handicap" is an inability to speak English. Unless they receive some bilingual instruction, the educational process will remain a mystery to them.

Courts have begun to reckon with these problems in several ways. They have held that the guarantees of the due process clause, which assures individuals a right to be heard before being denied "liberty," apply to school sorting decisions.[9] Both P.A.R.C. and Mills assure parents of children whom the school wishes to label as handicapped the right to a hearing before the placement decision is ultimately made. P.A.R.C. requires that school districts afford parents of retarded youngsters a hearing, presided over by an impartial examiner, to determine the appropriateness of the recommended placement. Mills extends this hearing right to all handicapped children. In both cases, the school district is obliged to demonstrate that special placement is in fact likely to benefit the child. If the district cannot substantiate that claim, then the regular classroom is presumed to be the correct assignment. Some legal scholars have begun to urge courts to go even further, and treat distinctions based on retardation as constitutionally suspect, just as distinctions based on race are presently regarded. Should that view gain judicial acceptance, a showing of "compelling" cause to segregate would be needed to justify assigning mildly handicapped students to classes for the educable retarded. Given the dismal record of those programs, few could be expected to survive such judicial scrutiny.

Questions concerning racial over-representation in special programs have also been subject to extensive litigation. Indeed, few of the suits thus far filed have failed to note the particular plight of the special student who is also non-white, and thus in a sense doubly-handicapped. In Larry P. v. Riles,[10] a federal district court confronted with gross racial disproportionality in San Francisco's program for the mildly retarded sought to address the issue by mandating an end to group IQ testing. While that decision appears to have reduced the total number of students labelled mildly retarded, racial disproportionality has actually increased. Those who brought the Larry P. suit have now reopened the case, urging that the court impose either a moratorium on IQ testing, presumably until some other less culture-bound test can be developed, or establish a ceiling on the number of admissible minority students in order to resolve the problem. Another California case, Diana v. State Board of Education,[11] focused on Mexican-American students, who had been identified as "special" simply because they were not fluent in English. The state agreed to test these youngsters in their native language, but that remedy has not altered the pattern of imbalance,

and the court has now ordered school districts in which disproportionality persists to devise a plan for eliminating the phenomenon.

Finally, several court decisions fault the schools for not recognizing real differences between minority and white students. In Lau v. Nichols,[12] the U. S. Supreme Court concluded that San Francisco's Chinese-Americans were entitled to instructions which took into account their inability to comprehend English. To deny them this special help, the Court seemed to say, was in effect to exclude them from the educational process. Similar claims of "functional exclusion" were advanced by Puerto Rican groups in New York City, who obtained a consent decree entitling them to a full bilingual program. These arguments are supported by the holding in Serna v. Portales (New Mexico) Municipal Schools[13] that Mexican-American students who fare badly in school have a right to bilingual-bicultural instruction. What this last group of cases suggests is that school districts have to take into account real differences in their students' backgrounds. Schools can no longer offer the same program for all, especially when some students are unable to take full advantage of that program because of differences in their background or ability.

THE IMPACT OF COURT DECISIONS[14]

The promise of law reform in this area is real: it imposes formal rationality on school sorting practices, provides heretofore excluded handicapped youngsters with some educational services, and provokes both publicity and the appearance of change. Each of these goals, if reached, will benefit the special child; and none of them should cause the catastrophes that some school professionals have predicted. But we are, at present, a long way from fulfilling the promise of the reformist agenda.

To understand why this is the case requires some sense of the school organization charged with carrying out the judicial mandate. Schools are not malevolent places, staffed with people who are indifferent to the fate of the handicapped and putatively handicapped. There is little justification for the suspicion that educators either dislike students or perversely resist change. Yet two quite different factors, the peculiar nature of "the problem," and certain structural and organizational attributes of present-day special education programs, make it difficult to translate legal reforms into educational reality.

The claims advanced on behalf of special children are divergent: The divergence makes it hard to imagine a coherent reform agenda. It would be difficult, by way of example, for even the most responsive school system to satisfy both middle-class parents who want intensive special programs focused on particularly "learning disabilities" and minority parents who urge that special programs be terminated because of their discriminatory effects. The lack of consensus concerning either the problem or its resolution suggests the wisdom of caution in probing alternative solutions.

Moreover, certain organizational factors militate against change. For one thing, special education invariably has too few resources to do even those things, such as early problem detection and educational intervention, which it can do well. For another, our knowledge about how "best" to treat handicapped children remains woefully primitive. The response to almost any interesting question concerning the education of the handicapped is either that the answer is unknown or that no generalizable beneficial effect of a given treatment can be demonstrated; this is especially the case with respect to the mildly handicapped. Finally, the organizational separation of special from regular education makes ventures at "mainstreaming," which cut across the organizational charts, hard to carry out. The regular system is so used to disposing of its problems by giving them to special teachers that it is disinclined to assume any responsibility for them. What those realities reveal is that more than a court decision or, for that matter, a legislative mandate is needed if special education is to become what the reformers hope to make of it.

These generalizations were borne out in a recently concluded study of the impact of the P.A.R.C. and Mills decisions, and of California legislation designed to make the identification of retarded and educationally handicapped students a less happenstance process. The findings of that inquiry are, in the main, discouraging. While school districts were able to identify previously excluded youngsters, they had little idea as to what sort of education to provide them; and in that regard, the state education agencies were of little help. Programs for children residing in state institutions floundered because of the difficulty of getting the institutional staffs to talk to, much less work jointly with, their education counterparts. Even the procedures designed to reduce the incidence of "bad" decisions appeared to have had only nominal impact. The examiners who conducted due process hearings in Pennsylvania and the District of Columbia tended to assume that whatever the school system wanted to do was "appropriate;" while the examiners were willing to listen sympathetically to the parents, the schools' position usually prevailed. In California, the less structured procedures required by the state served simply to rubber-stamp decisions already made through informal bargaining among teachers, principals, and psychologists. In few instances did children appear to be particularly well-served by these reforms.

It is easy to become overly pessimistic about these findings. They are based on evidence gathered shortly after the decisions were handed down, and follow-up studies suggest that a number of the problems were transitional difficulties. Some districts in Pennsylvania have been able, since the P.A.R.C. decision to expand their programs for the severely handicapped, and have begun to rethink the wisdom of assigning substantial numbers of students to classes for the mildly retarded. In both Pennsylvania and Washington, parent advocates have assisted in rendering the due process hearings in a manner more congruent with original court intentions. California is contemplating passage of new legislation that could conceivably secure better and more diverse special instruction to students and, therefore, more fully protect their rights.

This recounting contains some valuable lessons, both for the educator and for the reformer. First, change in legal standards does not ensure altered school behavior. To the extent that judicially-imposed rules seem impractical or infeasible to school personnel, they may be ignored or altered in operation. Second, some changes are easier than others to accomplish through legal mandate. In Pennsylvania, for example, a coordinated effort by state education officials and an active parents group identified 15,000 children who had previously received no education. That accomplishment is notable, but its significance should not be overestimated. Finding excluded children does not require school systems to undergo organizational change. Rather, it calls for a clever advertising campaign and for funds to conduct a school census. More basic changes, such as implementation of procedural safeguards or the insistence on "appropriate" educational placement, come more slowly. They require a reshaping of the special education program and a reexamination of the range of regular school offerings.

Third, the sorts of changes that P.A.R.C., Mills, and Larry P. contemplate would require wholesale reevaluation of school structures and organizational roles, and consequently may pose potentially threatening developments for school personnel. The status quo is not wholly praiseworthy, but it does offer a functional solution to those charged with teaching and administering schools. If the requirement of "appropriate" placement can be viewed as calling only for a choice among existing alternatives, the status quo is generally preserved; indeed, since many educators view what they have been doing as "best" for the child, they see little reason to change their ways. If due process hearings can serve simply to reaffirm decisions already made, and to mollify irate parents, they will have little organizational effect. Although these practices may subvert the ultimate goals of law reform, they may also constitute the only way school professionals know how to do their jobs.

Fourth, pressure stronger than the mere existence of a legal requirement is required in order to accomplish the ultimate goals of the law reformers. Parent groups may exert such pressure; its force and direction will depend upon whom the parent group represents, and on whether its commitment endures over time. If special educators are securely positioned in the school system, they too may push for reform. A strong commitment by state and district school administrators to adhere to regulations may induce formal rationality. Without the presence of at least some of these factors, legally-mandated alteration in special program practice may not have even nominal effect.

LOOKING TOWARD THE FUTURE

Resolving Tensions in Legal Doctrine

Judicial decisions concerning special students do not yet form a well-settled body of law. While the outcomes have thus far been remarkably consistent in that very few cases find the students' claims

to be constitutionally baseless, there is no settled set of doctrinal positions that can confidently be asserted. This lack of consistent positions may be problem-causing in that the discerning administrator can detect apparent inconsistencies among the outcomes, just as there are inconsistencies among the critiques of special education, and may be at a loss to determine "the" most appropriate course of action. As more and more of these disputes reach the judiciary, the tensions will become explicit and will require resolution.

For example, some suits seek more special instruction, while others urge a reduction of special programs and an end to the clear distinction between regular and special students. In large part, this difference relates to variations among the special children on whose behalf the litigation has been brought. The severely handicapped child cannot function, at least for the short run, outside of a special program. For example, routine drills in the three Rs will make no sense to him. The same is true for the non-English speaking person in that constant exposure to English language instruction will not confront a basic inability to comprehend the language. In both instances, appropriate special help is what is needed. For youngsters whom school psychologists would call "borderline normal," the issue is quite different. These children may need some special assistance, for part of each day, to help them cope with their particular problems; but, for the rest of the time, it seems sensible to treat them just like everyone else. Such treatment is consistent both with the fact that these youngsters are, as the President's Commission on Mental Retardation has noted, "six hour retardates." They are fully able to function outside of school and in all likelihood once they leave school are not discernible from the population at large.

There are, of course, borderline situations that will pose doctrinal difficulties. It is not hard to imagine the following scenario: one school district which abandons classes for the educable retarded is sued by parents who demand a right to "appropriate" special treatment; a neighboring district, which has maintained its educable retarded class is sued by parents of youngsters assigned to it and charged with denying those children an equal educational opportunity. While that hypothetical dilemma has yet to be posed, two California suits, one seeking an absolute ceiling on minority students labelled retarded and the other challenging the existence of an enrollment ceiling on programs for the "educationally handicapped," suggest that such conflicts may not be far away. Until the courts determine which programs must be offered, and which programs, if any, have to justify their very existence, school districts would be well advised to confer with parents before making placement decisions. Litigation of this type is likely to arise only when school and family are at odds with one another.

In some instances, the focus of litigation has been on substantive changes, such as a reduction in the number of minority students in special programs and the development of "appropriate" education for handicapped and non-English speaking youngsters. In other cases procedural fairness rather than a particular substantive outcome is sought. The inconsistency here is more apparent than real. At present, there exists only a handful of generalizable truths that courts or educators, for that

matter, can confidently assert concerning the education of handicapped students. For though it seems that all of these students are capable of profiting from an education, it does not seem intuitively plausible that black children should predominate in classes for students with mild handicaps. It appears that in these latter situations some judicially-imposed rules would make sense. They are also situations in which a constitutional predicate for such rules, such as the guarantee of the equal protection clause of the Fourteenth Amendment, is clear. In most cases, however, the "right" outcome is not so obvious. A court could not, even if it wished to, mandate the best educational program for every special child. Nor is it clear that it would have the constitutional warrant to undertake the task. But courts can recognize the importance of such individual decisions, and insist at the very least those individual decisions be made fairly. The guarantee of due process, if fully implemented, accomplishes this. It exposes to public purview the basis upon which decisions are being made, thus encouraging greater professional care in decision-making. And it permits parents and outside professionals to add pertinent information to the decisional calculus. Moreover, rules and procedures are not quite as dichotomous as this discussion might indicate. In each instance where procedural protections have been secured, the court has imposed a general rule to guide the inquiry, insisting that those seeking more "special" treatment for a particular child bear the burden of legal persuasion in the hearing. Within that framework, the decision-making process may be able to function effectively.

The tension most troublesome to those concerned about wise policy-making arises between those whose special concern is with the plight of minority students and those who generally find fault with programs for the mildly handicapped. If one is acting on behalf of black youngsters, it makes considerable political sense to insist upon an upper limit on the number of minority students who may be labelled "special;" indeed, that approach may appear the only feasible way to overcome the overrepresentation problem. Yet imposing a quota requirement implicitly embraces and sustains existing classifications, such as educable retardate, whose pedagogical justification is at best dubious. Such quota practices only serve to add another level of arbitrariness to existing practices and in doing so do not respond to real educational problems but only to statistical nicety and political reality. Over time, perhaps, the development of adaptive behavior tests and the like will render school districts better able to discern the abilities of those who fare badly on standardized tests. Or, if schools come to recognize that full-day special programs for such youngsters are time andpotential-wasting, the problem of overrepresentation may quiety disappear. But until one of those things happens, school districts may find themselves obliged either to undo racial and ethnic enrollment disparities in special education programs, or explain to a court why they cannot.

Devising Remedies

Thus far, the courts that have spoken to the rights of special children have done so in quite broad terms. This is less the case with

respect to due process, where judges can rely on well-established precedents in other institutional contexts, than with respect to substantive remedies. The judicial language remains fixed at the level of generality using such terms as the need for an "appropriate" or "suitable" education. But if it becomes clear that this standard is being used by school districts to preserve programs that have previously been tried and found wanting, further specificity can be anticipated. This has already happened with respect to other institutionalized handicapped persons. Specificity of this sort is not routinely contemplated because courts are sensitive to the political and institutional issues that such intervention poses. It is nonetheless consistent with the broad equity powers courts possess in designing remedies suited to the problem at hand.

If more specific decrees can be anticipated, they are likely to take one of two forms. They may require schools to create particular programs in order to meet constitutionally-cognizable needs. Using the Lau argument which states that Chinese-Americans are "functionally excluded" from schools conducted only in English, some decrees may find that other groups, such as those with particular handicaps and those whose opportunity for school success is impaired by linguistic or cultural factors, are also excluded from public education conducted in "standard English." If that argument prevails, it would oblige school districts substantially to diversify their offerings in order to reckon with real differences.

Another, and quite different possibility, is the development of new procedures intended to match a child's particular needs to a school program. Sometimes this matching can be quite mechanical. Where children have been excluded from school, either because of alleged ineducability or because of truancy, courts have insisted that they be offered remedial instruction to help then recover lost educational ground.[15] More imaginative approaches have also been adopted. In LeBanks v. Spears,[16] a New Orleans suit, the school district agreed to enter into a "special education contract" with each handicapped child, specifying the precise nature of the program that it would offer. Family approval was required before the school's obligation could be satisfied. One educator has proposed going further, and putting a two year time limit on such contracts. A mildly handicapped youngster who had not progressed out of special classes by that time would be entitled to an educational voucher in an amoung equivalent to the school's cost in educating that youngster. This voucher could then be used at a private school.[17]

Courts may also find themselves being asked to reallocate resources among special and regular programs. Doctrinally, that is a very difficult task, for while the Supreme Court has asserted the power to raise and disburse revenues, it has never been put to the test of doing so. But where state legislatures or school districts refuse to approve needed funds, judicial insistence that they do something may be the only way that the constitutional rights of special children can be satisfied.

The most frightening possibility from the point of view of the educators, is that courts will extend the scope of the Supreme Court's decision in Wood v. Strickland,[18] which held that students whose "clear" constitutional rights had been violated could recover monetary damages and will award similar relief to children who have been wrongly labelled as special education students. In two cases such damages have been sought, with inconclusive results: in one instance, the settlement included the award of nominal (one dollar) damages to each misclassified child, while the other suit remains pending. Legally, the justification for such a ruling in clear enough. Where the misassignment is based on the demonstrable negligence of school officials, and where the error can be shown to have caused some educational harm, the imposition of damages seems a reasonable remedy and maybe the only remedy likely adequately to compensate the child for what has been suffered. The spectre of damage awards might more effectively prod school professionals into reexamining their practices than any other, less directly-felt, court order.[19] What seems most likely to dissuade courts from embracing a damage remedy, at least in the short run, is the prospect that such suits would bankrupt school systems or at least force them to increase their liability insurance. Such an argument, however, hardly constitutes a principled rebuttal of the child's claim.

LEGAL REFORM AND SCHOOL REFORM

One thing is certain: for the next several years, more and more special education issues will be presented to the courts, and more and more school districts will find themselves in legal difficulty. What happens as a result of this new litigation will depend, in part, on how far courts are willing to go in extending what are at present quite nebulous constitutional rights of "special" children.

The Supreme Court will ultimately have the last word on the doctrinal questions. That Court has, in recent years, evidenced marked unwillingness to act as a "super school board;" but it has demonstrated its sympathy to those individuals who are totally denied schooling or who receive less than minimally adequate education.[20]

Equally important will be the actions that states and school districts undertake voluntarily, either to forestall litigation or to change educational practices. As states begin to enact legislation that guarantees to all children, not just those who are easy to teach, the right to an education that fits their particular needs, litigation concerning the rights of the severely handicapped will be unnecessary. In Colorado, among other states, this has begun to happen. As states recognize that special children need procedural safeguards to protect them against misplacement in classes for the handicapped, they will follow the lead of Massachusetts and insist upon the proceduralization of the placement process which in turn should reduce the need for additional litigation. And as states begin the even more basic task of reevaluating whether the delineation between programs for the mildly handicapped and regular education is beneficial to anyone and draft laws that encourage programmatic mergers, some of the most profound doubts concerning the educational efficacy of the enterprise which would otherwise be raised in court will be eased, if not put to rest.

If this happens, it will be all to the good in that legislators are better able than judges to adduce the financial and organization ramifications of education reform.

School district practice will also have profound influence on what role courts ultimately play with respect to special education. Many of the suggested state-wide reforms, such as adoption of procedural safeguards, could be adopted equally well by individual districts. More importantly, if bridges between the special and regular school worlds can be constructed and if children can be assured of discrete (and discreet) help without having to bear the label "special," then many of the previously-noted concerns will simply vanish.

Courts can insist on adherence to constitutional standards in defining the minimum obligation of school districts. But the ways in which both regular and special children are best educated will not be determined by the judiciary. These depend ultimately (as they always have) on the resources at hand and upon the knowledge, good will, and organizational capability to use those resources wisely. Questions concerning the education of exceptinal children have been with us for a long time. Judicial reexamination of these questions has forced, and will continue to force, all concerned parties to reconsider what they are doing to and for special children. Cases such as Mills and P.A.R.C. have assured exceptional children that they, like everyone else in the society, have certain basic legal rights. But court decisions cannot and will not provide the determinative resolution to these problems and will not fix the appropriate bounds of the rights of the handicapped. Even after the special children have gone to court, those tasks will be primarily the responsibility of the education profession.

FOOTNOTES

[1]347 U.S. 483 (1954). For a general discussion of the impact of law upon educational policy, see D. Kirp and M. Yudof, Educational Policy and the Law (Berkeley: McCutchan Publishing Co. 1974).

[2]Blatt. Introcution to "Symposium: The Legal Rights of the Mentally Retarded," Syracuse Law Review, 23 (Winter, 1972), pp. 991-1115.

[3]343 F. Supp. 279 (E.D. Pa. 1972). These cases are seldom reported in a publication readily accessible to educators. General publications, such as Education U.S.A., and such specialized journals as Exceptional Children, do enable the educator to keep abreast of current developments. The Department of Health, Education, and Welfare also publishes a quarterly publication on legal developments with respect to handicapped students. See also Kirp and Yudof, supra Note 1 at 664-721, for excerpted versions of these cases as well as relevant discussions in the education literature.

[4]348 F. Supp. 866 (D.D.C. 1972).

[5]Harrison v. Michigan, 350 F. Supp. 846 (E.D. Mich. 1972); Tidewater Society for Autistic Children v. Tidewater Board of Education, No. 426-72-N(E.D. Va., Dec. 26, 1972) (Unpublished opinion).

[6]See Hobson v. Hansen, 269 F. Supp. 401, aff'd en banc sub nom., Smuck v. Hobson, 408F. 2d 175 (D.C. Cir. 1969).

[7]Garrison and Hammill, "Who Are the Retarded?" Exceptional Children, 38 (September 1971), pp. 13-18.

[8]This research is summarized in Kirp "Student Classification, Public Policy and the Courts," Harvard Educational Review, 44 (February 1974), pp. 7-52.

[9]In Goss v. Lopez, 419 U. S. 565 (1975), The Supreme Court held that minimal procedural protections attach to short term suspensions; Goss reinforces the possibility that similar protection will be constitutionally afforded to handicapped students. See generally Kirp, "Proceduralism and Bureaucracy: Due Process in the School Setting." Stanford Law Review (forthcoming, 1976).

[10]343 F. Supp. 1306 (N.D. Cal. 1972).

[11]No. C-70-37 (N.D. Cal., July, 1970) (consent decree). See also Guadalupe Organization v. Tempe Elementary School Dist. No. 3., Civil No. 71-435 (D. Ariz. Jan. 24, 1972) (consent decree).

[12]414 U.S. 562 (1974).

[13]351 F. Supp. 1279 (D.N.M. 1972).

[14]Both the concepts and the case studies described in this section are examined in considerably greater detail in Kirp, Buss, and Kuriloff, "Legal Reform of Special Education: Empirical Studies and Procedural Proposals," University of California Law Review, 62 (January, 1974), pp. 40-155. This article appears in slightly altered form, in N. Hobbs (ed.), The Futures of Children (San Francisco: Jossey-Bass Co., 1975).

[15]See Knight v. Board of Education, 48 F.R.D. 115 (E.D.N.Y. 1969).

[16]Civil No. 71-2897 (E.D.La. 1973). Issues addressed in this case and elsewhere in this article are now treated in PL 94-142. For a detailed analysis of this legislation see, "An Analysis of PL 94-142," Washington, D. C., National Association of State Directors of Special Education, 1976.

[17]See Gallagher, "The Special Education Contract for Mildly Handicapped Children," Exceptional Children, 38 (March 1972), pp. 527-529.

[18]420 U.S. 308 (1975).

[19]See Sugarman, "Accountability Through the Courts," School Review, 82 (February, 1974), pp. 233-259.

[20]See San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) (dictum).

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